



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

the suits for penalties upon the prosecuting attorneys of the various counties was merely declarative of their duty under the general laws of the State, and interpret the "special charging" of *Fitts v. McGhee* to mean "an administrative duty such as is exercised by boards or ministerial officers, but not attorneys." The Federal Courts have, however, frequently enjoined attorneys-general from bringing suit.¹⁴ It is also true of all these cases that the duties laid upon the attorney-general by the statutes in question were merely declaratory of his duty to prosecute all suits for penalties incurred under State statutes and hence this distinction of the Court, too, seems to fall. The Court considered the penalties collectible for the benefit of the counties sufficient to give the State a pecuniary interest in the result. In a long line of decisions, however, the collection of penalties forfeited to the State have been enjoined.¹⁵ In both these respects the case seems to carry the principle of the Eleventh Amendment beyond any of its immediate predecessors, and the result of an appeal to the Supreme Court, if taken, should be awaited with interest. The question is one of ever-increasing importance, and appeals from the Circuit Courts of North Carolina and Minnesota¹⁶ involving similar questions under the Eleventh Amendment are now pending before the Supreme Court.

LIABILITY OF WHOLESALE MANUFACTURER TO CONSUMER.

The numerical weight of American authorities supports the doctrine that there is generally no liability of a manufacturer for injury to one purchasing from a dealer caused by defects due to negligence in the manufacture of those articles.¹ Three reasons are stated for this rule: First, that injury is not probable; second, that the agency of the dealer is an intervening, independent cause, and third, that public policy requires such a limit of liability of the manufacturer. It is submitted that in the case of latent defects, the first two reasons are unsound as being inconsistent with the law of negligence; for as to the first, there is an evident probability of danger—and as to the

¹⁴ *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Chicago, M. & St. P. R. R. v. Tompkins*, 176 U. S. 167; *Prout v. Starr*, 188 U. S. 544; *Haverhill Gas Co v. Barker*, 109 Fed. 694 (1901); *Consolidated Gas Co. v. Mayer*, 146 Fed. 150 (1906).

¹⁵ *Smyth v. Ames*, 169 U. S. 466; *Missouri, K. & T. R. R. Co. v. Missouri Railroad Commissioners*, 183 U. S. 53 (1901); *Chicago, St. P. & M. R. R. v. Tompkins*, 176 U. S. 167; *Prout v. Starr*, 188 U. S. 544; *Consolidated Gas Co. v. Mayer*, 146 Fed. 150 (1906).

¹⁶ *Ex parte Long*.

¹ *Huset v. J. I. Case Machine Co.*, 120 Fed. 865.

second, the mere passage of the article through the hands of an intermediate person who could not discover the defect does not constitute an intervening independent cause. If public policy is to decide the question, it should be noted further that the rule is in conflict with the common law principle which requires that a man should exercise care in the conduct of his business,² this duty being imposed because of the remunerative character of his employment, although the consideration need not necessarily move from the plaintiff. Thus, a physician has been held liable for negligence in treating plaintiff's wound, although he was hired by a third person.³ The rule of exemption from liability does not, despite *dicta* to the contrary, seem to be supported by the English⁴ cases, nor by those of New York⁵ or Minnesota.⁶

Moreover, there are admitted exceptions, and these exceptions "are as well defined and settled as the rule itself."¹ One of these exceptions exists in the case of negligence in the manufacture of articles which are "intended to preserve, destroy or affect human life."¹ Parenthetically,—it would seem that these "exceptions" are merely the most obvious instances of the application of the common law principle above referred to, but as the principle has been submerged these instances are left isolated. Within the scope of this exception, are explosives,⁷ drugs⁸ and foods.⁹

The recent case of *Tomlinson v. Armour & Co.*, 65 Atl. Rep. 883 (N. J.), held that a declaration was demurrable which alleged that the plaintiff had been made sick by eating diseased ham bought from a retailer, but negligently packed by the defendant wholesaler. The Court rested its decision upon a principle of contract law; *i. e.*, that there is no implied warranty of wholesomeness by a manufacturer in the sale of food to a retail dealer, a conclusion that seems supported by the weight of authority.¹⁰

It would seem, however, that the denial of the existence of such a warranty should not bar the plaintiff's claim, which was framed *in tort*. In fact, even if such a warranty had existed it could not have bound the defendant to whom the plaintiff was

² See Mr. Bohlen's essay on "The Basis of Affirmative Obligations in the Law of Torts," pp. 6, 10, 51-101.

³ *Pippin v. Shepard*, 11 Price, 411.

⁴ *George v. Skivington*, L. R. 5 Ex. 1; *Dalyrell v. Tyson*, 96 E. C. L. R.; *cf. Winterbottom v. Wright*, 10 M. & W. 109 (*dicta*).

⁵ *Devlin v. Smith*, 89 N. Y. 470; *cf. Fox v. Buffalo Co.*, 21 App. Div. N. Y. 321.

⁶ *Shubert v. Clark Co.*, 49 Minn. 331.

⁷ *Peters v. Johnson*, 41 S. E. 190 (W. Va.).

⁸ *Thomas v. Winchester*, 6 N. Y. 497.

⁹ *Bishop v. Weber*, 139 Mass. 411.

¹⁰ Benjamin on Sales, Sec. 671.

a stranger. The Court ignored the real ground upon which the plaintiff's claim rested; *i. e.*, the breach of a duty imposed by law. It is submitted that the case falls within the exception to the general rule as to liability of manufacturers, which exists in the case of an article "intended to preserve, destroy or affect human life." In the case cited above,⁹ which so held, it is said: "The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs, irrespective of any question of privity between the parties."

LIABILITY OF STOCKHOLDERS UPON UNPAID STOCK SUBSCRIPTION.

The liability of a stockholder upon his unpaid stock subscription to the corporate creditor, has always been worked out through the fictional person of the corporate entity, on the ground that the entity is the debtor of the corporate creditor. The problem has always been to devise some theory by which to prevent the stockholder from asserting rights, which are perfectly valid against the entity, in order to give the corporate creditor a greater right against the stockholder than that possessed by the entity itself. Two theories have been advanced. The "trust fund" doctrine regards the capital stock as a trust fund for the benefit of the creditors. When the stockholder attempts to escape liability, by settling up claims which are good as against the entity, as for example, a set-off or a release, but which would prevent any remedy to the creditor, he finds that the claims are no longer mutual, and cannot be set up against each other. This theory has been severely criticised. It is admitted that in the strict sense of the word there is no trust; that it is a misnomer; and that what is meant, is merely administration of assets in equity.¹ If that is so, the "trust fund" theory does not explain why the creditor should be given a greater right against the stockholder than that possessed by the entity. The other theory gives relief on the ground of fraud, in an action of deceit. It is said that the creditor is presumed to rely upon the stated capital of the entity, as security, and that when stock is issued, purporting to be fully paid up, when, in fact, it is not, he is deceived. The stockholder who accepts such stock is guilty of a misrepresentation, because he holds out the entity as possessing its capital stock fully paid up, when

¹ *Hollins v. Brierfield Coal and Iron Co.*, 150 U. S. 371 (1893); *McDonald v. Williams*, 174 U. S. 397 (1899); *O'Brear Jewelry Co. v. Volfer & Co.*, 106 Ala. 205 (1894); *Cook on Corporations* (5th Ed.).